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A TOPLESS DUCHESS AND CARICATURES OF THE PROPHET MOHAMMED

A FLEXIBLE CONFLICT OF LAWS RULE FOR CROSS- BORDER INFRINGEMENTS OF PRIVACY AND REPUTATION

Thomas THIEDE*

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In an era of global news networks and internationally distributed media, personal information can be disseminated faster than ever beyond national borders. A prime example is the publication of topless pictures of Britain's future Queen Consort, HRH *Catherine*, Duchess of Cambridge¹ in (so far) France, Italy, Sweden, Denmark and Ireland. At the same time, potentially injurious media coverage may not always be unjustified. Comprehensive information and critical comment is considered essential to society. One example is the publication of mocking caricatures of the prophet Mohammed in the French satirical magazine *Charlie Hebdo*, which awakened strong emotions in Muslim countries.

However, all parties involved – the journalist, the media outlet, and the person subject to such media coverage – benefit from a degree of legal protection with regard to their respective rights. Within this framework, it is left to courts and legislators to balance the interests of the parties concerned. For this purpose many civilian jurisdictions in continental Europe rely on codified personality rights. Even in the common law, where such rights remain un-codified, similar protection of reputation and privacy is increasingly visible alongside the longstanding protection given by the law of defamation.

Due to substantial differences in national histories, cultures, values and legislative techniques, protection of privacy and reputation is treated rather divergently throughout Europe. In fact, with regard to the topless photos of the Duchess of Cambridge, the respective domestic provisions protecting privacy vary to some extent. Some countries, such as Germany and Switzerland, differentiate between more or less intensively protected spheres in which the freedom of information, press and opinion outweigh the right to privacy to a greater or lesser extent. Other countries, such as France, regulate the protection of privacy through special norms, while others, such as England and Wales, subject the protection to privacy to piecemeal solutions. To be sure, in all European Member States any protection has to cede vis-à-vis issues of significant, legitimate public interest. However, what constitutes a legitimate public interest is yet again determined differently, due to the substantial differences in national histories, cultures and values, and is frequently obscured by complicated distinctions between private individuals unknown to the public and public or political figures.

As a result, the issue of which law ought to be applied is often decisive for the claim and is of great importance when, for example, the subject of injurious media coverage resides or maintains a significant presence in a State other than that where coverage was disseminated. This is also true when such material was obtained in a State where neither the aggrieved party nor the publisher resides. In

¹ Formerly known as Catherine MIDDLETON.

essence, such a situation necessitates a coordination of the potentially applicable laws via private international law provisions. And although the European Union (EU) has unified conflict of law rules on non-contractual obligations in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 (“Rome II”), the legislator, presumably, capitulated to an influential media industry by excluding from its scope the infringement of privacy rights and torts to reputation, such as defamation. Despite a review clause contained in Art 30(2) Rome II Regulation, the aim of which is to reconsider the issue, no uniform conflict of laws rule has yet been agreed upon, leaving contrasting national provisions to continue to determine the applicable law, which in this respect is a very unsatisfactory status quo.

In this article the existing proposals for a unified European conflict of laws rule will be critically analysed. Having exposed the weakness of these approaches a path for reform is suggested.

I. Basics of Conflict of Laws

In cases where a publication is disseminated in several States, conflict of laws rules set out to achieve two goals: (1) the harmony of outcome in like cases; and (2) the use of the law of the jurisdiction with the closest connection.² For the latter, particularly in continental Europe and all other jurisdictions that base their private international law rules upon the *Savignian* paradigm, the starting point is that the law of the country applies that is most closely connected to the legal relationship.

As for identifying the closest connection, it is the generally accepted view that this is based upon neutral criteria and ultimately the intention is to apply the legal order best suited to the conflicting interests of both parties. The particular strength of SAVIGNY’S paradigm of value neutralism is that private international law is utilised as a neutral mediator in international disputes where law, culture, and values differ. In a rather formal way it regulates and coordinates issues of the law applicable, while leaving diversity intact.

These considerations are the best example of legal principles derived from the logic of conflict of laws on a methodological level and overall are well established.

II. Lessons from Substantive Law

The considerations above are, however, only one part of the legal principles governing the methodology of this particular field of law. In addition, all concepts of private international law generally must be driven by the principles and values

² For the roots of this idea see F.C. VON SAVIGNY, *System des heutigen Römischen Rechts*, vol. VIII (1849), p. 28, 108, 120.

of substantive law; both sets of rules have to be put into context and should be coordinated as closely as possible.

Such an approach is constitutive, as substantive law and conflict rules are part of the same legal system which should not be contradictory in and of themselves, but should instead establish a coherent system of legal rules. Also, such consistency is required in connection with the infringement of privacy or reputation, particularly by the fundamental rights in the respective national legal systems, the Charter of Fundamental Rights (CFREU) and the European Convention on Human Rights (ECHR), all of which comprise the fundamental human rights to a person's reputation and privacy, on the one hand, and rights of freedom of expression and information, which extend to publications by the press, on the other hand.

A comparative legal study of a common core of principles of substantive law governing privacy and reputation need not be reproduced here.³ Nevertheless, some distinct aspects must be emphasised as they have a corollary in private international law.

A. Balancing of Interests as a *Leitmotiv*

First, there is a close link between the right to privacy and reputation and the freedom of expression and information within the specific national, social and cultural framework to which the respective parties belong. All European Member States provide for a dynamic relationship between both fundamental rights. Indeed in most systems only a comprehensive balancing of the interests of both parties can determine whether there was a right to privacy or reputation at all and, if so, whether this right was infringed by the publication. Accordingly, no clear-cut rule favouring the press or, conversely, the aggrieved party can be found in any European legal system. Ultimately, a fair balancing of conflicting interests is always required in each individual case.

B. Foreseeable Attribution of Damage

The second aspect of our analysis relates to fundamental principles of tort law. Basically, it is understood in all European Member States that the main purpose of tort law is to fully compensate damage. The application of this basic principle is, however, limited, as any damage sustained can be compensated only when and if such damages can be sufficiently imputed to the tortfeasor. This extends to cases of infringement of privacy or reputation. If pictures of the Duchess relate exclusively to details of her private life and have the sole purpose of satisfying prurient interests in that respect, no substantial public interest is involved that might serve as a justification for their publication. In that case, there would be sufficient reasons for

³ For comprehensive studies see G. BRÜGGEMEIER/ A. COLOMBI CIACCHI/ P. O'CALLAGHAN (eds), *Personality Rights in European Tort Law*, Cambridge 2010; H. KOZIOL/ A. WARZILEK (eds), *Protection of Personality Rights against Invasions by the Mass Media*, Wien/ New York 2005; Th. THIEDE, *Internationale Persönlichkeitsrechtsverletzungen*, Wien 2010.

holding the publisher liable. If, however, the photographs relate to the exercising of official functions by performing senior Royal duties, a substantial public interest would have existed and any damage would have to borne by the Duchess.⁴

It has to be emphasised that these grounds for imputation must be determinable by the journalist and the media outlet before publication. Or better stated, the citizen's ability to foresee the application of the laws of their State to their actions is a principle governing the written and unwritten constitutions of Europe. From this perspective it is obvious that the legislator can only impose obligations on their citizens as a class which is clearly defined with regard to their extent and likely effects. Only a rule knowable in advance gives citizens the option to adjust their conduct accordingly. Any unforeseeable application of a norm amounts to normative and official arbitrariness. The idea of a "chilling effect" as found in the jurisprudence of the European Court of Human Rights (ECtHR) evidences this point well: If, as emphasised several times by that court,⁵ the potential deterrent effect of an overly strict liability rule risks resulting in the general omission of critical journalism, any such norm is incompatible with the ECHR. Likewise, any rule must be unacceptable if the media outlet could not anticipate its application.

C. Perception of the Public

Closely related to the justification of public interest is, thirdly, the rule that the tortfeasor and the aggrieved party are not the only interested parties. Public interest and (accordingly) the assessment of whether the privacy and reputation of a person is harmed depends, in most European legal systems, above all on the way in which the relevant national community evaluates the situation.⁶ Concurrently, it is not the individual subjective view of the aggrieved party or the journalist or media outlet which needs to be taken into account to assess whether an infringement of privacy and reputation has occurred. The public interest as a justification rests on the view of the personally unrelated, reasonable, ordinary and fair-minded observer. Hence, it is the perspective of that public from the same cultural and social context that should count.

D. Indivisibility of Immaterial Harm

In sharp contrast to the question of how the wrongful breach is to be assessed, the calculation and compensability of damages are related to the aggrieved party alone. Most European legal systems agree that any non-pecuniary damages (that is, moral

⁴ See e.g. ECtHR, 24 June 2004, *Caroline von Hannover/Germany* [2004] ECHR 294 (Application No. 59320/00).

⁵ See e.g. ECtHR, 22 February 1989, *Barfod/Denmark* [1989] ECHR 1 (Application No. 11508/85): "the Court cannot overlook [...] the great importance of not discouraging members of the public, for fear of criminal and other sanctions, from voicing their opinions on issues of public concern."

⁶ See P. LAGARDE, *Rev. crit. dr. int. pr.* 1996, p. 501: "Tout dépend évidemment du public atteint par les exemplaires diffusés."

damages or damages for pain and suffering) are granted as a relief for the psyche and the state of mind of the aggrieved party, as he or she is likely to use them to buy alternative comforts and pleasures. To quote a Spanish proverb: *los duelos con pan son menos* – bread reduces the pain of mourning. And, without a doubt, in cases of infringements of privacy and reputation, it is this non-pecuniary loss that is often at the heart of the aggrieved party's claim.

Regarding the question of divisibility of such non-pecuniary damages, logic normally dictates that such damages are indivisible, just as are the psyche and the state of mind of the aggrieved party for whose relief they are granted.⁷

E. Effects of the Extent of Distribution

Finally, the sheer extent of publication of a defamatory statement, which is often coupled with repetition of an accusation in front of a great number of people, can easily create a false picture of the aggrieved party. If a false statement is repeated often enough and remains undisputed, the credibility of this statement increases because of its replication within a society. As most people fear reprisal or social isolation, public opinion is gauged to adhering to societal standards. As the ability to speak openly and address societal issues differentiates between citizens, those whose opinions are publicly under-represented become less likely to speak out and the (only alleged) majority becomes the status quo ("spiral of silence"). The mass media has an enormous impact on how public opinion is portrayed and can dramatically impact upon an individual's perception about where public opinion lies. As a result, the objectivity of the public is easily lost. Only when the aggrieved party can generate a counterpart to such repetition can the possibility of balanced media coverage be secured. By pursuing his or her own individual interests the aggrieved party antagonises the momentum of the extent of publication.⁸

⁷ The sad reality of arguments in this context forcing nonsensical legal analysis is a point that has not gone unnoticed. To quote the admonition by Weir in another context: "[...] the claimant is not half-mad because of what the first defendant did and half-mad because of what the second defendant did, he is as mad as he is."; see T. WEIR, The Maddening effect of consecutive torts, *Cambridge Law Journal (CLJ)* 2001, p. 238.

⁸ See D.A. SCHEUFELE/ P. MOY, Twenty-five years of the spiral of silence: A conceptual review and empirical outlook, *International Journal of Public Opinion Research* 2000, p. 3-28; D. FUCHS/ J. GERHARDS/ F. NEIDHARDT, *Öffentliche Kommunikationsbereitschaft: Ein Test zentraler Bestandteile der Theorie der Schweigespirale* (1991).

III. Existing Proposals for a Unified European Conflict of Laws Rule

A. Mainstrat Study

As no political compromise was reached on the question of the law applicable to infringements of cross-border privacy and reputation, a revision clause was introduced in Art 30(2) Rome II Regulation requesting a study on the situation in the field. Against initial hopes, this study was not carried out by a public research institute but, instead, by the private consultancy firm Mainstrat. The study delivered a bewildering result.⁹ The authors did not suggest a conflict of laws rule. Instead, they tried to invalidate the evident problem through reliance on statistics¹⁰ and suggested the adoption of a directive incorporating a substantive regulation of the minimum essential aspects of the protection of privacy and reputation on the basis of the ECHR and the CFREU, that is a European private law unification of privacy and reputation. However, no proposal for a directive covering such minimum essential aspects was provided.

The study could arguably be endorsed for its stringent insistence that, where no substantial differences in law exist, a solution need not be achieved by a conflict of laws rule. However, a directive on the minimum essential aspects of privacy and reputation is in any case extremely unlikely for the time being. The Principles of European Tort Law (PETL), a broad-based comparative project to create the foundation for discussing a future harmonisation of the law of tort in the European Union conducted by the European Group on Tort Law (EGTL), mentions only human dignity as a protected interest in its Art 2:102. The commentary to the PETL refers to the respective ambiguity of personality rights and the PETL do not provide for any rule addressing infringements of privacy and reputation at all.¹¹ The subsequent research addressing a possible future unification of European private law by the Study Group on a European Civil Code also avoided any clear statement. According to Art 2:203(2) Draft Common Frame of Reference (DCFR) VI., loss caused to a person as a result of injury to that person's reputation is only legally relevant if national law so provides. Thus, any application of this article arguably presupposes a conflict of laws rule to determine the relevant national law.

In essence, no unification of tort law regarding privacy and reputation has yet been attempted, which would force the drafters of the suggested directive to start from scratch. Considering the often vague outlook of efforts on unification of European private law, it seems doubtful whether such a directive would ever be politically endorsed.

⁹ Comparative Study on the Situation in the 27 Member States as regards the Law applicable to Non-Contractual Obligations arising out of Infringements of Privacy and Rights relating to Personality (2009), available at <http://ec.europa.eu/justice/civil/document/index_en.htm>.

¹⁰ With a sample size of merely n=371.

¹¹ H. KOZIOL, Basic Norm, in EUROPEAN GROUP ON TORT LAW, *Principles of European Tort Law. Text and Commentary*, Wien/ New York 2005, p. 30 *et seq.*

B. Mosaic Assessment

In *Bier v Mines de potasse d'Alsace*¹² and *Shevill*,¹³ the European Court of Justice (ECJ) held that a publisher could be sued at his or her place of establishment for all the harm caused by a publication or before the courts of each country where such publication was distributed and caused damage. However, in the latter case, the suit could be brought solely in respect of the damage caused within the respective court's territory. In light of those holdings, the European Commission also initially¹⁴ favoured such a "mosaic assessment". Parallel to the ECJ's findings, the law at the place(s) of dissemination should be applied; however, the latter law(s) only have relevance concerning the infringement in the Member State of publication, whereas the law at the residence of the media outlet applies to the whole Union-wide publication. The term "mosaic assessment" depicts, where damage is sustained in several Member States, that the laws of all Member States concerned will have to be applied on a distributive basis as tiny pieces, thus together giving the full picture of the mosaic, which is full compensation.

Without explicit reference, this theory is arguably driven by prejudices against foreign law and is constructed along the following lines. The question of whether and when an infringement of personality rights existed or is justified depends largely on national culture, which can differ fundamentally even within Europe. A distributive application would then appear to fit perfectly. In the continued absence of a consensus of European values concerning privacy and reputation, it seems appropriate to leave enough room for the differences using a distributive application of local national laws.¹⁵

Nevertheless, the fragmentation of the applicable law as a result of the mosaic assessment is in stark contrast with the intellectual development of conflict of laws in Europe over the last 150 years. Starting with *von Savigny*, it became the unanimous consensus that, from a multitude of unambiguous national connections to a legal dispute, the law of the country that is most closely connected to the dispute should govern the whole case. As mentioned above, the particular strength of this approach is that conflict of laws is utilised as a neutral mediator in international disputes where law, culture and values differ. Resting on the differences between legal systems as an argument was the style of early 19th century German discussion, but is not a characteristic of any contemporary approach. Certainly, legal systems are different and the manner in which privacy and reputation are conceived and enshrined differs as well, but this does not mean that the legal order of every marginally affected State must be taken into account. The cultural dimen-

¹² ECJ, C-21/76, *Bier v Mines de Potasse d'Alsace*, [1976] ECR 1735.

¹³ ECJ, C-68/93, *Fiona Shevill and Others v Presse Alliance SA*, [1995] ECR I-415.

¹⁴ EUROPEAN COMMISSION, Proposal for a Regulation on the law applicable to Non-contractual obligation (Rome II) COM(2003) 427 final, p. 11: "The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as «Mosaikbetrachtung» in German law."

¹⁵ See, for instance, OLG (Oberlandesgericht) Hamburg 8 December 1994, *Neue Juristische Wochenschrift – Rechtsprechungsreport (NJW-RR)* 1995, p. 792.

sion of personality rights is no excuse to circumvent the idea of the closest connection. Indeed, to allow such an approach is to rely on the historically out-dated principle of territoriality.

As a result, problems exist with a mosaic assessment when taking into account the non-pecuniary damages granted for infringement of privacy and defamatory statements. As mentioned at the outset, for this category of damages the situation in the substantive law of European States is clear: As non-pecuniary damages are granted for the relief of the unitary state of mind of the aggrieved party, they are also unitary and indivisible. Accordingly, in the context of conflict of laws, such damages differ proportionally depending on the number of times that a publication appears. Nevertheless, one degrading publication in multiple countries results in only one infringement of the feelings of the aggrieved party and, thus, in only one damages award. The psyche and the state of mind of the aggrieved party is relieved only once, not every time the same publication appears in a different country. Alternative comforts and pleasures for which non-pecuniary damages are granted are assessed only once and by one legal system.

Echoing such implausible fragmentation, one also has to doubt the general practicability of the concept in more realistic cases where a defamatory publication is distributed not only in two or three European Member States but many more. At first glance the ECJ's decision in *Shevill* may provide some help, since the judges held that the whole infringement could be compensated in the domicile of the media company. If the mosaic assessment is applied, contrary to the arguably good intentions of the ECJ, the court at the media outlet's domicile has to apply the laws of all the places where the publication was distributed depending on the respective infringement in that country. In other words, the judge at the domicile of the media outlet must apply all laws where the publication was disseminated to assess the damages granted to the aggrieved party. This includes determining the loss of reputation territorially, that is, to assess whether and to what extent the aggrieved party's standing was lowered and whether this was justified according to the Member State's law. He would then have to assess whether and to what extent a mental injury occurred in the respective Member State and how such distress is relieved there. Bearing in mind the differences in each jurisdiction and each protected domain due to cultural, political and socio-legal reasons as well as divergent codification techniques, such a Herculean task should not be left to judges. One can sincerely doubt whether practice could ever meet this standard of factual and legal accuracy.¹⁶ In cases with a substantial circulation, the judge will not and essentially cannot, apply all respective laws. As a result, the judge, arguably, will estimate the wrongful conduct and damages as a whole and subsequently extrapolate both the local wrongful conduct and local damages according to the extent of dissemination in the respective countries. As a realistic alternative, parties may

¹⁶ So far no European Member State court has employed the mosaic assessment in that regard. For experiences in the US see *e.g. Hartmann v. Time, Inc.*, 166 F.2d 127 (3rd Cir. 1948): "[...] we must treat [...] the place where publication occurred as covering the United States and the civilized countries of the world" and the comment by W.L. PROSSER, *Interstate Publication*, *Mich. L. Rev.* 1993, p. 973: "That way madness lies" and LEARNED HAND, J. in *Mattox v. News Syndicate Co., Inc.*, 176 F.2d 897, 900 (2nd Cir. 1949): "[...] in application it would prove unmanageable."

bring (as the Duchess did)¹⁷ their action solely in respect of the damage caused within the Member State's territory. Of course, in such a way the aggrieved party will either fall short of full compensation or has to pursue his or her claims in a number of courts throughout Europe.

One final criticism can be levelled against the proposed mosaic assessment in the everyday case, where the paparazzo, the journalist and the editor-in-chief jointly contribute to one wrongful publication. If one of the tortfeasors is held personally liable and seeks contribution from his or her accomplices, he will face significant problems. According to Art 20 Rome II Regulation, internal redress among multiple tortfeasors is governed by the law applicable to the original claim. As a result, the same multitude of laws that were applied to the publication must then be applied to the internal redress. One must bear in mind that such redress differs in all European Member States, ranging from proportional liability to the total exclusion of such claims. As a result, in lieu of one applicable law to the original claim, a coherent redress action between the tortfeasors seems impossible.

The conflict of laws based mosaic assessment cannot fulfil its own dogmatic standard for the assessment of wrongful conduct or damages. Provided the aggrieved party wants to be compensated for the full, internationally-distributed publication, either the judge at the domicile of the media outlet must depart from the dogmatically sound conflict of laws approach by "guessing" an appropriate injury and corresponding damages or the aggrieved party is left to sue in multiple countries or for only partial compensation. Finally, the hope of simple internal redress amongst multiple tortfeasors would in any case be entirely corrupted.

C. Alternative Application of Several Laws

1. By Choice of the Aggrieved Party

In response, some scholars¹⁸ have argued for a general presumption in favour of allowing the aggrieved party a choice on the applicable between the law at the residence of the publisher and the law at one place of dissemination. The connecting factors proposed by the ECJ ought to be retained but the aggrieved party should choose only one of them, so only one law is applied.

To some extent this was recently accepted by the ECJ for online publications. In *eDate*, the court allowed the plaintiff three options for the competent court: (1) to bring an action for all the damage caused before courts of the Member State in which the publisher is established; (2) to bring an action before the courts of each Member State in which the content was physically distributed for the

¹⁷ See Tribunal de grande instance Nanterre 18.09.2012, *Catherine Elizabeth Middleton et a. c/ Sas Mondadori Magazine France et a.*, *L'Équipe* Octobre 2012, No. 298.

¹⁸ See G. HOHLOCH, in *Erman, Bürgerliches Gesetzbuch*, vol. II (12th ed.), Köln 2008, Art. 40 EGBGB, para. 53; F. VISCHER in *Zürcher Kommentar*, IPRG (2nd ed.), Zürich 2004, Art. 139 IPRG, para. 12; A.F. SCHNITZER, Gegenentwurf für ein schweizerisches IPR-Gesetz, *Schweizerische Juristen-Zeitung* 1980, p. 314; K. SIEHR, *Das Internationale Privatrecht der Schweiz*, Zürich 2002, p. 378.

damage that occurred in the Member State of this court; and (3) only for online publications, before the courts of the Member State in which the centre of his or her interests is based, that is to say, often his or her habitual residence.¹⁹ Parallel to the ECJ's findings and rendered as a conflict of laws rule, this would read as a choice for the aggrieved party between the mosaic assessment and his or her habitual residence.²⁰

Both solutions may be welcomed. This is, partly, because the fragmentation of applicable laws which would result from a mosaic assessment is dismissed (at least in part) and also because only one Member State's law would be applied, which would ease the judge's burden, reflect the uniformity of the non-pecuniary damages correctly and allow for a simple internal redress among multiple tortfeasors.

Nevertheless, the substantive law concept of balancing the conflicting interests of tortfeasor and aggrieved party would be ignored, as both approaches take only the interests of one party into account – here, those of the allegedly aggrieved party. It seems excessive that only one party should have the opportunity to prefer his or her interests alone without any further justification.

2. By Means of Publication Technique

Finally, as the case of the Duchess clearly demonstrates, tying the aggrieved party's choice to a purely technical differentiation between physical publication and publication online, as suggested by the ECJ as a way to identify the competent court, is rather odd in the common scenario of distribution of the same content both in print and online. Pursuant to the *eDate* principle rendered as a conflict of laws rule, English law would be applied in the Duchess' claim to the whole damage sustained due to the online publication, whereas the judgment on the print product would be limited to the damage that occurred in the UK only. If the Duchess sought full compensation, she could file a claim in England for the online content, which is subject to English common law, and simultaneously in France for the print version. In less clear-cut cases, such as those involving the caricatures of the prophet Mohammed, this approach would obviously create the risk of irreconcilable judgments for virtually identical content.

¹⁹ ECJ, C-509/09, *eDate Advertising GmbH v. X* and C-161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*.

²⁰ The German *Bundesgerichtshof* referred whether Art 3(1) and (2) of Directive 2000/31/EC ("e-commerce Directive"), OJ 2000 L 178, p. 1 had the character of a conflict of laws rule requiring the exclusive application of the law in force in the Member State of origin or whether they operate as a corrective measure to the law declared to be applicable pursuant to the national conflict of laws rules. In a nutshell, the ECJ held that the liability standards applied to an electronic commerce service shall not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State of origin (para 68). In any case this ruling applies only to providers of an electronic commerce service in the sense of Art 3(1) of the Directive and is thus only of limited interest within the ambit of this article.

D. Identifying an Exclusive Connection

As shown above, a distributive or alternative application of a multitude of laws does not provide an adequate mechanism to deal with cross-border infringements of privacy and reputation. Instead, a viable solution to the shortcomings addressed could be the application of a single law identified by using the principle of closest connection and calculated by assessing factors relevant to the individual cases. Such factors include the following:

1. *Habitual Residence of the Aggrieved Party*

The draft of the European Group for Private International Law (EGPIL)²¹, the preliminary draft proposal of the European Commission (2003)²² and (to a lesser extent) the judgment of the ECJ in *eDate* and the recent Proposal of the European Parliament²³ have argued in general for the application of the law of the state of the habitual residence of the aggrieved party.

The application of that law is convenient at first glance. A general assumption that the result of an invasion of personality rights is generally within the contemplation of the public at the domicile of the aggrieved party is not misplaced. Additionally, four fundamental interests of the aggrieved party will be best encompassed and represented at his or her habitual residence. Firstly, the aggrieved party will be familiar with the legal order and rules (at least in layman's terms). Secondly, the aggrieved party has an interest in maintaining his or her good standing within his or her chosen social environment, which will be respected by applying the law of the habitual residence. The major focus of such actions is to remedy a loss of reputation, so it seems natural to focus on these legal, moral and cultural conceptions crystallised at the domicile of the aggrieved party. Application of the law of an aggrieved party's habitual residence would also be endorsed by the national society, as the nation's citizens would not be judged according to foreign standards. Thirdly, it is reasonable to assess the aggrieved party's non-pecuniary damages according to the standards at his or her habitual residence, because the restitution of harm will be carried out in this country. Hence, market prices there will be decisive in assessing the amount of damages, as alternative comforts and pleasures are likely to be bought at the aggrieved party's domicile. Fourthly and finally, in many cases it is a clear advantage that the law at the domicile of the aggrieved party is a connecting factor to only one law, correctly representing the uniformity of non-pecuniary damages.

There are also arguments against the use of habitual residence. Any application of such local law will not be suitable in cases where the aggrieved party has only a formal domicile in a certain country but is not socially integrated into the

²¹ Available at <<http://www.gedip-egpil.eu>>.

²² Art 7 COM 2003 427 final, 2003/0168 (COD).

²³ Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) 2009/2170 (INI), p. 8.

local community. These concerns take on increased strength in the case of a public figure or celebrity, as such persons tend to have multiple domiciles in different States and – unsurprisingly, due to lifestyle or employment – alternate between them. The assumption that the interests of the aggrieved party are inseparably connected to his or her domicile simply does not reflect the itinerant lifestyles of persons of public interest.

Furthermore, the substantive law concept of balancing conflicting interests of both parties militates against a shift to a connecting factor which focuses on the aggrieved party alone. The application of the law at the domicile of the aggrieved party is not inherently more just than applying the law of the habitual residence of the relevant media outlet or, indeed, at other places of distribution. The interests of the media outlet are being considered only after the benefit of knowledge of the applicable law is given to the aggrieved party. The idea that a national society has a strong interest in applying its moral and legal rules to one of its citizens again betrays a single minded focus on the aggrieved party, even though the society in which the media outlet has its residence has the same interests.

These are not mere dogmatic objections. The sole application of the law of the habitual residence of the aggrieved party will lead to unreasonable difficulties for any media company with serious coverage of foreign affairs, because an overwhelming multitude of laws must be adhered to. The media company would consequently be obliged to undertake in-depth investigations into the law of the presumed effective state of habitual residence of each person on whom they wish to report. Besides the tremendous costs of research into foreign laws, such an approach would inevitably lead to situations where critical coverage (e.g. caricatures of the Prophet) would be impossible, such as where blasphemy is punished domestically. If such regimentation of the free press existed (effectively, as a tort action for blasphemy, heresy or apostasy) that restrictive law would be applied even where a media company respected all standards of journalism in the law at its domicile. As a result, the application of the law of the habitual residence of the aggrieved party would obviously pose a significant impediment to media freedom.²⁴

2. *Habitual Residence of the Publisher*

The application of the law at the domicile of the media outlet obviously addresses the latter argument with regard to the restriction of media freedom. The law of the statutory seat, central administration or principal place of business of the media outlet will be clear to the company's journalists, photographers, and legal consultants. Thus, this connecting factor encompasses the need that liability – the grounds for the imputation of damage – must be determinable by the journalist and the media outlet before publication. As mentioned, any unforeseeable application of a norm amounts to normative and official arbitrariness, labelled in the area of media

²⁴ See Th. KADNER GRAZIANO, *Europäisches Internationales Deliktsrecht*, Tübingen 2003, p. 87; J. VON HEIN, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen 1999, p. 328 both with extensive further reference.

freedom as a “chilling effect” by the ECtHR. If, as emphasised several times by that court, the potential deterrent effect of an overly strict liability rule risks resulting in the general disappearance of critical journalism, any such norm is incompatible with the ECHR. Any rule whose application is unforeseeable must similarly be incompatible, as the media company could not anticipate its application. The same applies where there is a conflict of laws rule which renders a national rule applicable, but unforeseeably so. Where the unforeseeable rule is of a much more stringent standard than the corresponding rule in the foreseeable countries of distribution, legal certainty is violated.

Nevertheless, applying the law of the habitual residence of the aggrieved party and the law at the statutory seat of the media outlet are two sides of the same coin – the connection takes only the interests of one party into account. Of course, the aggrieved party’s legitimate expectations focus on the protection provided by the law of the country where he participates in public discourse and, thereby, exposes his or her rights and interests to potential infringement. Beyond the need for foreseeable imputation of damage, there is no compelling argument for treating the aggrieved party’s interests in being compensated, both in the estimation of his or her fellow compatriots and financially, inferior to other interests. It seems odd to subjugate the interests of the victims to those of the tortfeasor to the extent that the latter’s standard determines even the entitlement to compensation.

IV. Centre of Gravity

The analysis above demonstrates that seeking to isolate one sole factor to govern the process of identifying the applicable law is a fruitless and ultimately unjust exercise; no single connecting factor can hope to produce justice in all situations. Instead, systems incorporating several connecting factors could be established, which in essence establish a centre of gravity and thereby the closest connection.

A. Methodologies

1. *Deductive Reasoning and Subsidiary References*

One starting point could be to simply formulate several conditions to be met in order to determine the law with the closest connection. Any rule can be analysed and restated as a compound conditional statement in the form “if X, then Y”. The second part (“then Y”), commonly known as *apodosis*, is prescriptive and for our purpose evidently clear. It is the law with the closest connection and, thus, prescribes the one law applicable. The first part, (“if X”), the *protasis*, indicates the scope of the rule by designating the conditions under which the rule applies. A solution could be a *protasis* of several conditions to be met in order to specify one applicable law. Such a *protasis* would, in stages, exclude legal systems with only a minimal connection to the case or none at all.

2. A Flexible System

Concurrently, one may also argue for a more flexible approach. European legal systems rely on a comprehensive balancing of the interests of both parties in determining whether there was even a right to privacy or reputation at all and, if so, whether this right was infringed. Inevitably, such comprehensive balancing can apply to the corresponding conflict of laws rule. In other words, no clear-cut *protasis* would be formulated, but instead only a set of elements that would be taken into account when prescribing the *protasis*.

Such a methodology is not a revolutionary innovation to conflict of laws. In fact, this methodology was already present in the pre-Rome II regimes of a number of systems. For example, the UK position on the applicable law in this area can be found in the Private International Law (Miscellaneous Provisions) Act 1995. Sec. 11 states that: “Where elements of those events [torts] occur in different countries, the applicable law under the general rule is to be taken as being [...] the law of the country in which the most significant element or elements of those events occurred.”

3. Common Features

The guiding aim of both solutions is to apply the law with the closest connection to the case either by focusing on a set of fixed, clear-cut conditional connecting factors or by avoiding an overly rigid structure. Both systems are apt to better take into account the complementary features of additional connecting factors, thereby balancing the interests of all parties. Both approaches must explicitly identify all the relevant factors within such cases and, in the case of a flexible system, then weigh these elements according to their relevance. Ultimately, the law determined, that is the law with the closest connection, should govern the whole case at hand.

B. Elements

1. Perception of the Public

As demonstrated, the aim of applying only the one law with the closest connection to the whole case does not produce a compelling result when only the law at the domicile of the media outlet or the aggrieved party is automatically applied. However, the tortfeasor and aggrieved party are not the only interested parties. One key paradigm in substantive law provides that the assessment of whether or not the privacy and reputation of a person is harmed depends above all on the way in which the particular national community evaluates the situation. Accordingly, how the defamatory publication is perceived by the general public in the respective publication's state must also play a crucial role for the conflict of laws rule.

Reference to the place where such public considers a publication to have violated an individual's reputation or privacy seems a compelling starting point, as this does not favour the interest of any one party and cannot be easily manipulated by either party.

Nevertheless, the crux of the matter, *i.e.* to apply only one law, remains an issue if a publication was widely distributed. At least in the first world, the sheer number of potentially applicable laws from States where a publication was disseminated is likely to overburden any sizeable news provider. Hence, within either approach a further element must be introduced to isolate a single applicable law.

2. *Foreseeability of the Applicable Law*

A necessary condition of any conflict of laws rule ought to be that only those legal systems for which the application of their law could be foreseen by the defendant should be open for application. Just as substantive law requires foreseeable criteria to impute an infringement of privacy and reputation to the media outlet, the conflict of laws solution should require the additional element of foreseeability to justify the application of a distinct law providing for the latter's responsibility.

Two points may be raised against such foreseeability of the applicable law. Firstly, Member State's substantive privacy and defamation laws generally impose liability only for intended or foreseeable publication. As a result, it is arguable that foreseeability is not needed in conflict of laws. The fact that European legal systems provide for either an objective or subjective assessment of such foreseeability militates against such "subsequent" application. The tortfeasor's conduct will be assessed with reference to the objective ordinary person, which in this case is the typical occupational skills of journalists. The subjective standard is whether different conduct was to be expected from this given journalist in this given situation. Depending on the relevant standard in the State of publication, results regarding the imputation of liability may differ, thus interfering with the conflict of laws paradigm of reaching a harmony of outcomes in similar cases. Moreover, such an approach is impractical. It would involve initially applying a Member State's law only to subsequently discover that under said law the imputation of liability was ultimately unforeseeable. Unnecessary and at times tremendous costs could be saved and possible deficiencies of research into foreign laws could also be avoided.

Secondly, in the *eDate* judgment the ECJ rejected such an approach with regard to online publications. The court held that "content may be consulted [...] irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control."²⁵ Respectfully, the court has digital feet of clay, as this statement ignores the technical reality of today's online media. Most networks, including all computers on the Internet, use the TCP/IP protocol as the standard for communicating on a network. In the TCP/IP protocol, the unique identifier for any computer is called its Internet Protocol address (IP address). Computers use this unique identifier to send data to other specific computers on a network. Just as any website has a unique IP address,²⁶ the user himself or herself provides his or her

²⁵ ECJ, C-509/09, *eDate Advertising GmbH v. X* and C-161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*, para 45.

²⁶ For example, the ISP of the Swiss Institute for Comparative law (<www.isdc.ch>) has the IP address 80.83.47.148, and its server is hosted (with 13 others) at Travers, Switzerland.

own IP address when requesting the website's content. Of course, media outlets utilize the user's data. For instance, when visiting some websites most users will have noticed an advertisement on that page directly markets them or that a specific page or information therein is blocked. Such advertising or blocking is commonly known as geo-targeting and is done by analysing the location of the user's IP address or analysing the hops in a trace route of the user's IP address.²⁷ Of course, the information gathered will mostly point to the geographical location of the user's Internet Service Provider (ISP) only.²⁸ Nevertheless, as these providers typically exist on a national level, even the most rudimentary form of geo-targeting will be able to identify the user's country and could thereby allow or deny access accordingly.²⁹ Thus, it is possible to identify a specific address or exclude a specific national public to make the application of a Member State's law foreseeable.³⁰

Of course, the term "foreseeable" then needs to be characterised within conflict of laws, an issue which cannot be addressed in detail here. Nevertheless, comparative studies reveal that both a majority of European legal systems and secondary EU law favour an objective approach together with an abstract assessment of behaviour.³¹ Thus, the concept of autonomous characterisation employed by the ECJ, which provides that concepts in conflict of laws "must be given an autonomous meaning, derived from [...] the general principles underlying the national systems as a whole,"³² will in all likelihood result in the application of

²⁷ Plenty of more sophisticated tools are available, e.g. Google Analytics.

²⁸ The Internet Assigned Numbers Authority (IANA, see <<http://www.iana.org/>>) delegates allocations of IP address blocks to Regional Internet Registries (RIRs), for Europe to the Réseaux IP Européens Network Coordination Centre (RIPE NCC) (see <<http://www.ripe.net/>>), which subsequently distributes IP address blocks to Local Internet Registries (LIR). LIRs (i.e. Internet Service Providers, enterprises, or academic institutions) assign most parts of this block to its own customers.

RIPE provides a public database containing registration details of the IP addresses originally allocated to members by the RIPE NCC. The database provides information which organisations or individuals currently hold which Internet number resources, when the allocations were made and contact details, see <<http://www.ripe.net/data-tools/db>>.

²⁹ For all Internet Websites running on Apache HTTP Server (currently more than 50% of all Webservers worldwide, see <<http://news.netcraft.com/archives/2013/06/06/june-2013-web-server-survey-3.html>>) it is extremely easy to deny visitors from select countries to access a website with two easy commands ("deny, allow access") in the .htaccess-file. For instance, to block all traffic from Switzerland some 50 IP-ranges will be blocked, all easily to manage, see e.g. <<http://www.ip2location.com/free/visitor-blocker>>, <https://www.countryipblocks.net/country_selection.php>.

³⁰ It is submitted here that the bypassing of blocked content on a website with the help of proxy-servers or IP-spoofing would amount to *fraus legis* and should, thus, be unforeseeable.

³¹ See P. WIDMER, Comparative Report on Fault as a Basis of Liability and Criterion of Imputation, in P. WIDMER (ed.), *Unification of Tort Law: Fault*, Wien/ New York 2005, p. 347 *et seq.*, paras 39 *et seq.*; M. KELLNER, Comparative Report, in H. KOZIOL/ R. SCHULZE (eds), *Tort Law of the European Community*, Wien/ New York 2008, p. 564, No. 22/19.

³² ECJ, case 29/76, *LTU Lufttransportunternehmen v. Eurocontrol* [1976] ECR 1541.

an objective standard. Thus, the question of whether the journalist was able to foresee the imputation of liability abroad will most certainly be assessed objectively, that is with regard to the typical occupational skills of the group of journalists.

Still, in the world of modern media it is clear that any test based on the foreseeable perception of the public will continue to result in multiple applicable laws, such as is the case for online publications. Finding only one applicable law must then involve assessing an additional suitable connecting factor to one of these systems.

3. *Social Connections of the Aggrieved Party*

Where the system in which the aggrieved party habitually resides is among the systems where the public foreseeably conceived the publication, it stands out as a suitable narrowing factor.

Firstly, a significant part of the aftermath of an infringement of privacy or reputation will occur within the social environment of the aggrieved party, wherever that may be. Because the major focus of the relevant action is to remedy the harm caused to the aggrieved party's reputation in the eyes of that person's contemporaries, it seems correct to focus on the place of domicile. Besides, this connecting factor serves as a simple proxy for the place where the party maintains his or her significant social connection. Such connection may also include the country in which the family of the aggrieved party lives or where the predominant numbers of business contacts exist.³³

Secondly, so as to adequately respect the interests of the media outlet, attention must then be given to the aggrieved party's compensation. It seems right to assess the aggrieved party's non-pecuniary damages according to the standards at his or her habitual residence, because the restitution of harm will arguably be performed in this country. Hence, the market prices there will be decisive for the assessment of damages as alternative comforts and pleasures are likely to be bought at the aggrieved party's domicile.

Nevertheless, where changes of domicile are frequent or a person enjoys an international reputation, the assumption of a connection between the aggrieved party and a particular identifiable social environment either does not exist may be difficult to determine, or may be entirely arbitrary.

Moreover, any approach based on deductive reasoning, *i.e.* the staggered exclusion of legal systems is limited in cases where the all-important public was addressed by a defamatory statement in countries other than the country of the domicile of the aggrieved party.³⁴ Here, the domicile of the aggrieved party cannot

³³ For this approach see *e.g.* OGH (Austrian Supreme Court) 8 Ob 235/74, *Juristische Blätter* 1976, p. 103.

³⁴ See *e.g.* the case of Kurt Waldheim, United Nations Secretary-General (1972-1981) and President of Austria (1986-1992), who faced accusations in US-Media for his service as an intelligence officer in the Wehrmacht during World War II and was nevertheless elected to power at home. Throughout his term as Austrian president, Waldheim and his wife Elisabeth were officially deemed *personae non gratae* by the United

be applied as subsidiary connecting factor to single out one applicable law from the states of publication. Thus, it is not possible to formulate a *protasis* incorporating both conditions.

4. Extent of Publication

A suitable alternative approach would be to focus on the extent of distribution within the various systems.³⁵ The law of the system in which the most extensive distribution has taken place may be the most appropriate, as the aggrieved party will be able to serve both his or her own interests and also to satisfy a wider societal function. As mentioned at the outset, to avoid the persistence of a false picture of the aggrieved party due to repetition which would be the result of extensive circulation balanced media coverage can only be secured when the aggrieved party can generate a counterweight to such repetition. By pursuing his or her own interests in the State with the greatest distribution, this spiral of silence may be best avoided and the overall, international momentum of distribution reversed.

Again, in the *eDate* judgment the ECJ revealed a lacuna of judicial knowledge with regard to information technology when it indicated that the extent of distribution is technically impossible to quantify with regard to online content.³⁶ On the contrary, the geo-tagging tools described above show that there is sufficient information in the website server's access log to determine the locations with the greatest numbers of accessing users, as such data is essential to online marketing.

However, there are limits to this approach. If only a small number of defamatory publications reach a system where the aggrieved party had extremely significant social connections, the latter – arguably appropriate law – would not be applied. For instance, if the aggrieved party maintains significant business contacts in a certain system and only a very limited amount of coverage concerning the aggrieved party was distributed there, yet the parties significant business contacts received them, the non-application of this law could result in an inappropriate restriction in favour of the defendant.³⁷ Again, a *protasis* enclosing all conditions will fail.

C. Conclusion

Any clear-cut, conditional rule comes with such rigidity that it may do serious injustice in many particular cases. As a result, having identified the failings of

States. See J. VON HEIN, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen 1999, p. 335.

³⁵ See P. LAGARDE, (note 6), at 501.

³⁶ ECJ, C-509/09, *eDate Advertising GmbH v. X* and C-161/10, *Olivier Martinez and Robert Martinez v. MGN Limited*, para. 45.

³⁷ See OGH (Austrian Supreme Court) 8 Ob 235/74, *Juristische Blätter* 1976, p. 103; G. WAGNER, *Ehrenschutz und Pressefreiheit im europäischen Zivilverfahrens- und Internationalen Privatrecht*, *RabelsZ* 1998, p. 276.

overly rigid rule, a more adaptable solution for cross-border infringements to reputation and privacy is advocated. What follows is one suggestion for how such a flexible system based on the above analysis of all relevant elements might be arranged:

If the publication was viewed in multiple countries, the law of the country to which the publication has the closest connection shall be applied. In determining this closest connection, the utmost weight is given to a balanced and predictable solution because fairness and predictability are the fundamental principles of any legal system and essential for the legitimacy of the law.

Firstly, fairness normally results when applying the law of the country where the public perceived the publication, as this does not favour the interests of any one party and cannot be easily manipulated by either party. A flexible rule would thus read as follows.

The more one of the states represents the public perceiving the publication or broadcast, the more this state's law should be applied.

Secondly, predictability of the application of these laws must be based on the test of whether an ordinary defendant media outlet could objectively foresee that the public in another state would perceive the publication. A second flexible rule would thus read as follows.

The more the perception of a state's public was objectively foreseeable to the defendant media outlet, the more this state's law should be applied.

Thirdly, the aggrieved party's social connection would then be assessed, establishing the extent and type of harm suffered. This results in a third, consecutive yet flexible rule.

The more one of the states where the public perceives the publication or broadcast foreseeably represents the social connections, especially the habitual residence of the aggrieved party, the more this state's law should be applied.

Finally, the nature and the quantity of the distribution of the publication within each legal system must be assessed. A final flexible rule could thus read as follows.

The higher the extent of distribution of the publication was between of states where the public foreseeably perceived the publication, the more the more this state's law should be applied.

Of course such a rule could be rendered in the negative.

The application of a national law has to be the more dismissed, the less this legal system represents the perception by the public of an infringing publication or broadcast, the less the application of this law was objectively foreseeable for the defendant media outlet, the less this system represents the social connection of aggrieved party and the less this publication or broadcast was distributed in this legal system.

Finally, with a view to the Rome II Regulation and with more weight on the perception of the public and the foreseeability for the defendant media outlet, another suitable phrasing could be the following.

In the case of a non-contractual obligation arising out of violations of privacy or rights relating to personality, including defamation, the law of the state where the perception of the public of the infringing publication or broadcast was objectively foreseeable for the defendant shall be applied.

If the publication or broadcast was perceived within multiple countries, the law of the country to which the publication or broadcast has the closest connection shall be applied. This closest connection is determined by weighing each of the following factors: the social connection of the aggrieved party to each country, especially the common habitual residence of the aggrieved party; and the nature and extent of distribution within each country.

V. Concluding Remarks

This analysis of cross-border invasions to privacy and honour discloses a pressing need for reform. The status quo is antiquated and the European legislator is called for reform. Pan-European media markets – even in the absence of the Internet – are an increasing feature of modern life. The easy availability of media on- and offline, distributed far beyond the national borders of a media outlet's home state, and an information-hungry public are apt to produce even more complicated cross-border infractions in the coming years.

In lieu of a European consensus on the legal protection accorded to reputation and privacy, these problems are best tackled by an explicitly flexible conflict of laws rule like the one suggested here. Only such a rule is adequately respectful of the importance of balancing journalism against privacy and reputation as well as the interests of both media outlets and the subjects of injurious media coverage.

Nonetheless, proponents of such flexible rules are at times confronted by a standard counter-argument of endangering legal certainty. Rather, quite the opposite seems to be correct. Predictability of the outcome of any rule can only be achieved when courts clearly consider and state the relevant factors and their weight in respective judgments. Only addressing and weighing the relevant elements – rather than manipulating law and facts to avoid inequitable results – renders decisions predictable.

In particular, from the perspective of conflict of laws these counter-arguments may also be ignored. A flexible system is especially appropriate for an area of law which was essentially always a flexible system. Conflict of laws never was and still is not governed by rigid rules, but instead strives for a flexible approach using the standard of the closest connection.